

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Vonage Holding Corporation's)	WC Docket No. 03-211
Petition for Declaratory Ruling)	
Concerning an Order of the)	
Minnesota Public Utilities Commission)	

COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

While the narrow issue presented by Vonage's petition -- preemption of a specific decision of the Minnesota Public Utilities Commission -- no longer is of pressing concern,¹ this proceeding illustrates the acute need for the Commission to carry through on its stated intention of initiating a comprehensive proceeding to establish a national framework for the treatment of Internet-based services. Until recently, the Commission's hands-off approach to the Internet has succeeded in establishing an environment in which innovation and investment in the Internet and Internet-based services has flourished. That approach increasingly has been under assault, as states and service providers have sought to resolve a variety of questions relating to the appropriate treatment of Internet-based services in an *ad hoc* manner. The Commission, for example, has several open proceedings considering the appropriate classification of wireline broadband services, the universal service implications of Internet-based services, and the applicability of 911 requirements to such services, among others. At the same time, more than a dozen states are considering or have attempted to impose common carrier-type regulation on

¹ See *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, Civil No. 03-5287, at 17 (D. Minn. Oct. 16, 2003) (permanently enjoining the Minnesota Public Utilities Commission from regulating Vonage as a telecommunications carrier under state law).

Internet-based services such as those offered by Vonage, SBC,² and other providers. These proceedings threaten to extend to the Internet a patchwork of inconsistent and conflicting regulatory requirements that will stifle further innovation and investment in new Internet-based services. SBC therefore supports the Commission's stated intent to initiate a proceeding to establish a comprehensive, national framework for the treatment of Internet-based services.

There is no doubt that the Commission not only has the authority but also the duty to establish such a framework. Section 230(b)(2) of the Communications Act establishes that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §230(b)(2). Equally important, the Act gives the Commission jurisdiction over "all interstate and foreign communication by wire," 47 U.S.C. § 152(a), and Internet-based services are, without question, interstate communications by wire. Thus, consistent with Congress's stated policy objectives, the Commission should adopt a clear and broad federal framework designed to protect Internet-based services from common carrier-type regulation under the Communications Act.

That is not to say that the states have no role to play with respect to advanced Internet-based services. Important issues will have to be resolved about whether consumer protection, universal service, 911, or similar obligations should attach to Internet-based services. The Commission should systematically address those questions, and the states should play a significant role in that process.

² The California PUC, for example, recently requested that SBC IP Communications, Inc., obtain a certificate of authority to provide its Hosted IP Communications Service (or HIPCS), which is an interstate information service that utilizes Internet Protocol (IP) technology to provide an integrated suite of applications that includes Internet access, call management, and routing functionality. *See* Letter of Keith J. Epstein, Vice President and General Counsel, SBC Data Services, Inc. to John M. Leutza, Director, Telecommunications Division, Public Utilities Commission, State of California (Oct. 22, 2003) ("Epstein Letter") (Attachment A).

Although the Commission should establish a comprehensive national framework for the treatment of Internet-based services, there is no need for the Commission to defer to a future proceeding the resolution of the intercarrier compensation issues raised by the attempts of AT&T and other carriers to avoid access charges by using IP transport to carry plain old telephone service traffic that originates and terminates on the circuit switched telephone network. Calls that originate and terminate on that network do not raise issues unique to the advanced Internet platform (and are not even properly characterized as IP telephony or Internet-based traffic) simply because, at some point, they involve IP transport. The Commission's failure to address these issues, and, in particular, to reject AT&T's petition, will needlessly complicate the other regulatory issues relating to legitimate Internet-based services. It also will undermine the universal service objectives of the Act. The Commission, therefore, should promptly reject AT&T's petition and put an end to it and other carriers' attempts to arbitrage the access charge regime.

II. DISCUSSION

SBC supports the Commission's stated intention to initiate a proceeding to establish a national framework that clearly insulates offerings of Internet-based services from common carrier-type regulation at the federal and state levels. Only a *comprehensive* resolution of both pending and potential regulatory issues will effectively eliminate uncertainty and foster investment in Internet-based services without picking winners and losers.³ Section 230(b)(2) of

³ This also is consistent with the need to ensure neutrality with respect to different services. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, para. 4 (2002) (stating that "the Commission should avoid policies that have the unintended consequence of embracing too quickly any one technology"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 and CS Docket 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at para. 73 (2002) ("[W]e strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.").

the Act recognizes no exception to the goal of protecting “the Internet and other interactive computer services” from regulation. 47 U.S.C. § 230(b)(2). A comprehensive approach will permit the Commission, in Chairman Powell’s words, to consider Internet-based services from the “cleanest slate possible.”⁴ And only such an approach will enable the Commission to hew to Congress’s express policy goal of allowing the Internet to flourish free from regulation.

III. SBC SUPPORTS THE COMMISSION’S STATED INTENTION TO INITIATE A PROCEEDING TO ESTABLISH A BROAD, NATIONAL FRAMEWORK FOR THE PROPER TREATMENT OF INTERNET-BASED SERVICES.

While the Commission’s hands-off policy vis-à-vis the Internet is well-established and its success is widely acknowledged, there is a considerable risk that, without decisive Commission action, this approach will unravel. States are beginning to impose common carrier regulation on certain Internet-based services, and the Commission has been asked to address a growing list of regulatory issues relating to such services, each on an *ad hoc* basis. Unless the Commission steps in and enunciates a comprehensive and coherent national framework for the proper treatment of Internet-based services, providers of those services could be subjected to multiple, inconsistent regulatory requirements. Such a patchwork not only would be inherently inconsistent with the pervasively interstate nature of the Internet, it also would deter entry and innovation and undermine Congress’s clear goal of creating an environment in which Internet-based services can flourish.

Before the Commission, there are both the now-mooted Vonage petition for a declaration that Minnesota’s regulation of Vonage’s IP telephony service is preempted, and at least two other requests for Commission declarations that particular uses of the Internet or IP protocol

⁴ FCC Chairman Michael K. Powell, Keynote Speech at the U.S. Telecom Association’s Annual Conference, Las Vegas, Nevada (Oct. 14, 2003) (“Powell USTA Speech”).

deserve specific regulatory treatment.⁵ Other issues raising the question of how Internet-based services should be treated are pending in other proceedings involving wireline broadband,⁶ universal service,⁷ and emergency 911 requirements.⁸ The Commission is being asked, therefore, to consider possible regulation of Internet-based services in a variety of discrete matters. Addressing these issues on an *ad hoc* basis without any unifying and limiting principle presents the specter of other possible regulation as the next set of unforeseen questions arises. It also raises concerns that, if the Commission addresses issues of Internet regulation one issue at a time, the result will be a complex, potentially inconsistent, and shifting patchwork of regulation. Both outcomes will discourage investment.

The need for a comprehensive national framework is heightened by the fact that at least 15 states have begun either to regulate IP telephony or to consider doing so. In recent months, public service commissions in Minnesota and Wisconsin took steps to subject providers of such services to regulations applicable to traditional telephone companies.⁹ Likewise, California

⁵ See *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Oct. 18, 2002); *Petition for a Declaratory Ruling that pulver.com's Free World Dialup is neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003).

⁶ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20 and 98-10, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3019 (2002).

⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, et al., Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002).

⁸ See *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Further Notice of Proposed Rulemaking, 17 FCC Rcd 25576 (2002).

⁹ See *Order Finding Jurisdiction and Requiring Compliance, In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket No. P-6214/C-03-108 (Sept. 11, 2003); *Wisconsin Decides VoIP Getting Too Big to Ignore*, Broadband Business Report (Sept. 23, 2003) (noting that the Wisconsin commission, without a hearing, sent a letter to at least three providers of IP telephony directing them to comply with state regulations applicable to telecommunications carriers).

recently sought to require SBC IP Communications, Inc., which provides solely interstate information services that use IP technology, to obtain a certificate of authority, and thus subject it to the fully panoply of telecommunications regulation.¹⁰ Other states -- including Alabama, Colorado, Illinois, Michigan, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Virginia, and Washington state -- are investigating whether to take similar action, and this list is growing by the week.¹¹ States also will be forced to consider the status and treatment of Internet-based services in the context of arbitrating incumbent LECs' interconnection and unbundling obligations under section 251 of the Act. The inevitable result will be arbitrary regulation, extending to only a small subset of competitors providing IP telephony and other Internet-based services, and that will serve only to distort competition and impede innovation to the detriment of consumers.¹²

The Commission's approach to protecting the Internet and Internet-based services from federal and state regulation has been highly successful for many years. Both the Commission and the states stayed out of the Internet "space," relieving the Commission of the necessity to consider and adopt a comprehensive framework -- beyond declaring "hands off" -- to achieve that goal. That approach no longer can work. The large and growing list of state proceedings in this area, and the various proceedings pending before the Commission, require it to take

¹⁰ *California Joins VoIP Regulation Party*, Broadband Business Report (Oct. 7, 2003) (noting that the California commission sent letters to six providers of IP telephony requiring them to comply with state regulations governing telecommunications services);

¹¹ See Alan Breznick, *States Weigh Regulating VoIP As Traditional Phone Service*, Cable Datacom News (Oct. 1, 2003); Peter Lewis, *Rules for Internet telephony challenge regulators; Is it telecommunications or information services?*, Seattle Times, at C1 (Oct. 15, 2003) (describing recent proceedings initiated in Washington state and Oregon); Margaret Boles, *Missouri PSC Considers Opening Proceeding on VoIP*, Telecommunications Reports Daily (Oct. 20, 2003).

¹² In California and Wisconsin, for example, state regulators recently sent letters to a small handful of IP telephony providers demanding that they obtain state certification.

affirmative action to implement Congress's declared policy against regulation of the Internet by following through on its expressed intent to initiate a proceeding to establish a comprehensive, national policy framework for Internet-based services. The principles and definitions the Commission adopts in that proceeding should guide the outcome of the various other pending proceedings in which similar issues are implicated.

In that proceeding, the Commission should recognize that the states too will have an important role to play in working with the Commission to address a range of ancillary issues, including, *inter alia*, the scope of providers' obligations to provide appropriate 911 service and comply with emergency preparedness requirements. These important issues will need thorough discussion and careful consideration in their own right at both the federal and the state levels, and the Commission's declaration that Internet-based services are unregulated will not, by itself, determine their resolution. Indeed, as Chairman Powell recently clarified, a minimally regulatory approach to the Internet does not mean "no regulations," but rather "the right regulations for this service."¹³

IV. THE COMMISSION SHOULD PROMPTLY REJECT AT&T'S PETITION, AND THUS ELIMINATE INCENTIVES FOR CARRIERS TO ENGAGE IN ACCESS CHARGE ARBITRAGE.

The Commission should delay no further in resolving AT&T's petition. AT&T's petition to exempt its purported "IP telephony" product from access charges raises no unique issues regarding Internet-based services. The services AT&T provides to its customers are nothing more than plain old telephone services. The fact that AT&T uses Internet-based transmission facilities as transport does not mean that AT&T is providing anything more than basic voice telecommunications services. Indeed, from a customer's perspective, that is precisely what AT&T is doing, and it bills its customers accordingly.

¹³ Powell USTA Speech.

AT&T has made no attempt in its petition to characterize its “IP telephony” service as an information service, nor could it. As SBC explained in its comments on AT&T’s petition,¹⁴ all interstate telecommunications services that make use of the public switched telephone network are subject to access charges, regardless of whether they happen to be provided over an IP backbone. The purported “IP telephony” provided by AT&T and others is no exception. As a consequence, under the Commission’s existing rules, there is no question that AT&T’s service is subject to both originating and terminating access charges.¹⁵

While changes to the overall intercarrier compensation scheme are long overdue, the Commission is considering those in its *Inter-carrier Compensation* proceeding. Just as issues relating to the proper treatment of Internet-based services should be considered comprehensively, changes to the intercarrier compensation rules likewise should be decided in a broad framework, not a service-specific one. Until the Commission does so, the existing rules remain in place and should be enforced. And until the Commission definitively confirms that access charges continue to apply in the circumstances described in AT&T’s petition, carriers will continue to have incentives to try to evade their obligation to pay switched access charges by routing basic telecommunications services that originate and terminate on the circuit switched telephone network over Internet-based transmission facilities and attempting to characterize such services as “IP telephony.” Each day that the Commission delays confirmation of the application, its

¹⁴ See Opposition of SBC Communications Inc., *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Dec. 18, 2002); Reply Comments of SBC Communications Inc., *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Jan. 24, 2003).

¹⁵ True IP telephony services also are subject to terminating access charges, even if they are properly classified as information services. The Commission, however, can address that issue in the context of its proceeding to establish a national framework for the treatment of Internet-based services.

long-standing access charge rules, carriers will be encouraged to engage in the circuitous, uneconomic, deceptive, and/or unlawful routing of traffic that threatens to undermine universal service objectives through schemes to avoid interstate and intrastate switched access charges, which still implicitly support basic local phone service in many states. The Commission should not allow its consideration of this issue to be further delayed by consolidating it with its comprehensive review of the proper treatment of Internet-based services.

V. CONCLUSION

SBC supports the Commission's expressed intention to initiate a proceeding to consider a comprehensive national framework for the treatment of Internet-based services. However, the Commission should not defer to any such proceeding resolution of the intercarrier compensation issues raised by AT&T's attempt to arbitrage the access charge regime by using Internet-based transport to carry basic telecommunications services. The Commission therefore should promptly reject AT&T's petition.

Respectfully Submitted,

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October 22, 2003

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**Re: Your letter to Gregory Williams/SBC IP Communications, Inc., dated
September 22, 2003**

Dear Mr. Leutza:

We are writing in response to your letter to Gregory Williams, the former President of SBC IP Communications, Inc. ("SBCIP"),¹ dated September 22, 2003, in which you claim that SBCIP is offering intrastate telecommunications service for profit in the State of California and request that SBCIP file an application for a certificate of authority to conduct business as a telecommunications utility by no later than October 22, 2003.

For the reasons discussed below, we respectfully take issue with the claim that SBCIP is offering intrastate telecommunications service. While you do not identify a particular service in your letter, presumably you are referencing SBCIP's Hosted IP Communications Service ("HIPCS"), which is the only product that SBCIP currently offers in California. HIPCS is not a telecommunications service, nor is it subject to the California Public Utilities Commission's ("CPUC's") jurisdiction. Rather, HIPCS is an interstate broadband service that utilizes Internet Protocol ("IP") technology to provide customers an integrated suite of applications that includes Internet access and robust call management and call routing functionality. As such, it fits squarely within the definition of an information service under the federal Telecommunications Act (the "Act") (*i.e.*, a service that offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..." 47 U.S.C. §153(20)).

First, as a form of Internet access, HIPCS directly implicates the definitive conclusion of the FCC that Internet access is appropriately classified as an information service. *Report to Congress, Federal-State Joint Board on Universal Service*, 13 FCC Red 11501, 11536, ¶73 (1998) ("*Universal Service Report*"). The heart of HIPCS is a web-browser-based information and communications management tool that users can

¹ Mr. Williams is no longer employed by SBCIP.

access from anywhere via the Internet. With this “dashboard,” a user can log onto the HIPCS system from wherever she may be (her desk, her home, traveling overseas) and access all of the functions of HIPCS. Indeed, HIPCS both enables and is enabled by Internet access: Not only is one of the linchpins of the service the mobility flexibility that is the hallmark of Internet access (*i.e.*, logging on from a remote location anywhere around the world at any time), but also HIPCS’s many features include those that are emblematic of Internet access, including email, web browsing and the use of the domain name system. Under FCC precedent, this synthesis with Internet access, alone, qualifies HIPCS as an information service.

Second, HIPCS’s additional applications (*i.e.*, those beyond conventional Internet access) buttress the conclusion that HIPCS meets the statutory definition of an information service. The FCC’s conclusion in the *Universal Service Report* that Internet access is an information service focused on the fact that Internet access providers do not offer a pure transmission path; instead, they combine computer processing, information provision and other computer-mediated offerings with data transport to offer users a level of information manipulation, storage and retrieval that is unlike the direct, unimpeded transmission path associated with circuit-switched POTS. *Universal Service Report*, 13 FCC Rcd at 11536-11539, ¶¶73, 76. Likewise, HIPCS offers the end user much more than the pure transmission of voice traffic over an IP network. It provides robust call management and call routing functionality that cannot be utilized over today’s circuit-switched networks or otherwise in the absence of computer mediation. Among other things, HIPCS allows users to initiate calls from various numbers² using the HIPCS web-browser; through computer mediation manage the manner in which various types of calls route to them, regardless of their physical location;³ detect other users on the network; filter unwanted messages; and, listen on their computers to stored voice mail messages delivered through unified messaging functionality. In short, like Internet access, HIPCS comprises a varied suite of computer-mediated applications that employ information manipulation and retrieval, store-and-forward capabilities, and processing functions that allow end users to route, manage and control their calls and communications setups. In that sense, HIPCS cannot properly be analogized to POTS or other telecommunications services that simply provide an end-to-end transmission of voice telephony.

The fact that HIPCS includes voice functionality does not alter the analysis. HIPCS’s voice capability is simply one application that rides over the same HIPCS network as the other applications associated with the service, and the packets carrying

² A HIPCS user can, as an example, log onto the web browser over the Internet from a hotel and direct the system to initiate a call *from* the hotel phone or his cellular phone, without ever touching either of those pieces of equipment.

³ A HIPCS user can actually define any number of discrete groups of potential callers (*e.g.*, VIPs, other business contacts, friends, family, etc.) and have each group routed to the user in different ways (*e.g.*, VIPs would continue to route through various options from the office number to an assistant to a cellular phone whereas friends would route directly to voicemail). And those routing protocols can be altered for each group depending on the time of day.

voice traffic are indistinguishable from the packets enabling the various other HIPCS applications. In fact, despite its voice component, HIPCS does not satisfy most of the characteristics the FCC tentatively concluded in the *Universal Service Report* would render an IP telephony product a telecommunications service. See, *Universal Service Report*, 13 FCC Rcd at 11544, ¶88: SBCIP does not hold itself out principally as providing voice service in connection with HIPCS, but rather markets the service as a communications management tool that offers users the benefit of accessing the service's many features wherever they can find a broadband or Internet connection; HIPCS requires Customer Premises Equipment ("CPE") different from that used in connection with traditional touch-tone calls; and, many of HIPCS's capabilities (email, web access, computer mediated message storage, etc.) encompass the capability for manipulating information. In short, a customer primarily seeking a traditional telephony product would have no need for HIPCS and its enhanced features.

Third, the CPUC does not have jurisdiction over this interstate service. The functionality of and technology behind HIPCS render the notion of an "intrastate call" (*i.e.*, a call subject to the CPUC's jurisdiction) inapposite. Because HIPCS uses the foundational protocol of the Internet to route and transport data, including any voice packets, it is impossible to separate out (and regulate) any discrete, intrastate communications services enabled by HIPCS. On the originating end of a HIPCS transmission, the packets associated with a voice transmission appear to the HIPCS packet router no different than the packets associated with the other applications (web browsing, changing call routing setups, email) that the user might be using at the same time. Beyond that, while a call initiated by a user may *look* like it originates at the user's desk, it may have in fact originated somewhere else entirely, including in another State. Thus, while, at first glance, it may appear to the HIPCS system that a user is making a call from her office to her mother three blocks down the street, in fact she is just as likely to be making the call from another State 2000 miles away. In short, HIPCS is predominantly an interstate service appropriately regulated, if at all, by the FCC. Any attempt by States to impose tariffing and regulatory obligations on this intertwined package of enhanced functionality, Internet access and call management capabilities (in contrast to State attempts to regulate an offering that consists only of intrastate calling functions) would impermissibly intrude on the clear federal policy to refrain from regulating the Internet, as well as the FCC's general jurisdiction over interstate offerings. See, *e.g.*, Memorandum Opinion and Order, *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd 1619, 1621-1622, ¶¶12-16 (1992); *California v. Federal Communications Commission*, 4 F.3d 1505, 1515 (9th Cir. 1993). Finally, as with traditional Internet access, the key enabling equipment (web portals, features servers, soft-switches) will in almost all cases be located outside the State in which the user is located, thus reinforcing the fact that HIPCS is predominantly interstate in character.⁴

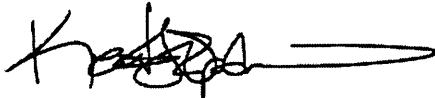
⁴ Although HIPCS is an interstate information service, appropriate access charges nonetheless apply when HIPCS traffic terminates onto the traditional circuit-switched network.

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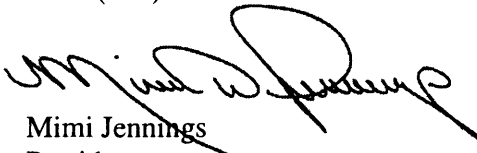
Simply put, HIPCS is not an appropriate object of the CPUC's regulation. As the United States District Court for the District of Minnesota recently held, in striking down the Minnesota Public Utilities Commission's directive that Internet voice provider Vonage Holdings Corporation comply with Minnesota statutes and rules regarding the offering of telephone service, state regulation of these Internet-based voice services "would effectively decimate Congress's mandate that the Internet remain unfettered by regulation." *Vonage Holdings Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-5287, slip op. at 2 (D. Minn. October 16, 2003). The CPUC should likewise resist any instinct to shackle these nascent, developing and innovative services and technologies with legacy forms of telephony regulation that could never reasonably have anticipated the sea change that certain forms of IP telephony, like HIPCS, will cause. As the district court noted, regulating IP telephony simply because it in part involves voice communication ignores the many complexities of the issue. *Id.* at 16-17.

For all these reasons, SBCIP respectfully declines the CPUC Staff's request that it seek a certificate to offer intrastate telecommunications service within the State. Please let us know, however, if you require additional information to further your consideration of this issue.

Very truly yours,



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